No. 3910

United States Circuit Court of Appeals for the Ninth Circuit

CROSSETT WESTERN LUMBER COMPANY, a Corporation,
Appellant,

vs.

SUDDEN & CHRISTENSON, Claimants of the Cargo of the American Steamship "TAMPICO",
Appellee.

No. 3910

BRIEF FOR APPELLANT

Upon Appeal From the Southern Division of the United States District Court for the Northern District of California First Division.

PLATT & PLATT, MONTGOMERY & FALES,
Proctors for Appellant.

IRA S. LILLICK, Esq.,
Proctor for Appellee.

IRWIN-HOOSON

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STATEMENT OF THE CASE

This is a second appeal in this cause. The prior appeal was by the present appellee from a decree and judgment of the District Court in favor of the Crossett Western Lumber Company and against Sudden & Christenson. The case was reversed in this court and

sent back to the District Court to ascertain and adjudge the amount, if any, to be awarded the libelant upon the issues created by the libel and the answer thereto, and the damages, if any, to be awarded to the appellant under the issues arising upon the cross-libel, and to enter a decree accordingly.

There is in the record (Apostles, pages 44 and 45) a stipulation and an order that the apostles on appeal in the former appeal shall be considered as part of the record on this appeal, and that it will be unnecessary to reprint such portion of the record as is included in the apostles on appeal in the former appeal. A similar stipulation was made as to the exhibits, so that by stipulation and order of court, the case is now here on the record made on the prior appeal, together with such additional record as is necessary to show matters occurring subsequent to the decision on the prior appeal.

In order to distinguish between the apostles on this appeal and the apostles on the former appeal, made a part of the record on this appeal by stipulation of the parties and order of court thereon, we will refer to them in this brief as "first apostles" and "second apostles".

In order not to tax the memory of the court as to the salient points of the record in this cause, we will, as briefly as possible, review the facts of the case in order that there may be a clear understanding of the questions presented on this appeal.

On April 15, 1915, the Pacific Coast Steamship Company, the owner of the steamship "TAMPICO",

chartered that vessel to the Crossett Western Lumber Company. The charter-party provided for the redelivery of the vessel to the owner not later than July 1, 1916, unless the date of redelivery should be extended. The charter-party contained the further provision that the owner might, if it should so elect, require that the vessel be redelivered to it at Seattle, Washington, May 15, 1916, upon its giving written notice on or before February 1, 1916.

On October 18, 1915, the Crossett Western Lumber Company sub-chartered the steamship to Sudden & Christenson. The sub-charter-party gave to Sudden & Christenson the use of the steamship for a stipulated voyage, with the option of a second voyage. There was on the sub-charter-party a marginal provision as follows: "Subject to the conditions of redelivery as per charter between the Crossett Western Lumber Company and Pacific Coast Company".

On December 20, 1915, Sudden & Christenson wrote to Crossett Western Lumber Company and asked for a copy of the charter of the "TAMPICO" from the Pacific Coast Steamship Company to the Crossett Western Lumber Company.

Instead of sending a copy of this charter as requested, the manager of the Crossett Western Lumber Company wrote a letter to Sudden & Christenson under date of December 27, 1915, advising them that the charter between the Crossett Western Lumber Company and the Pacific Coast Steamship Company was practically the same as the charter on the Steamship "EUREKA", a

copy of which Sudden & Christenson had, except that the "TAMPICO" was to be redelivered about June 15, 1916, instead of May 15, 1916.

On December 31, 1915, Sudden & Christenson notified the Crossett Western Lumber Company of its intention to exercise the option for a second voyage.

This court on the prior appeal held that, notwithstanding the terms of the charter-party, the Crossett Western Lumber Company, by failing to mention the anticipation privilege, was estopped thereby from declaring a termination of the sub-charter prior to the 15th day of June, 1916, if, relying on this incorrect statement, Sudden & Christenson entered into a new contract.

The Pacific Coast Steamship Company on January 7, 1916, notified the Crossett Western Lumber Company that it required a redelivery of the vessel by May 15, 1916, and on January 10, 1916, the Crossett Western Lumber Company wired Sudden & Christenson as follows:

> "Under no circumstances can we allow TAMPICO go to Atlantic Coast.
>
> Crossett Western Lumber Company."

Further correspondence followed, but Crossett Western Lumber Company adhered to the position taken that the "TAMPICO" could and would not be allowed to go to the Atlantic Coast.

Notwithstanding, and with full knowledge of the position of Crossett Western Lumber Company, Sud-

den & Christenson, as sub-charterers, began the second voyage February 22, 1916, and sent the vessel to South America to load a cargo of nitrate for W. R. Grace & Co.

Long prior to the events just narrated, in September, 1915, Sudden & Christenson had chartered to W. R. Grace & Co. the steamer "EUREKA", to carry a cargo of nitrates from the West Coast of South America to New York, but the closing of the Panama Canal had prevented the voyage.

Seeking to fulfill this existing obligation to W. R. Grace & Co. created by the charter of the "EUREKA", Sudden & Christenson undertook to substitute the "TAMPICO" for the "EUREKA", the "TAMPICO" being in the Pacific Ocean.

D. B. Dearborn & Co. of New York were New York agents for Sudden & Christenson for chartering for their account and for the handling of their vessels on the Atlantic Coast. January 4, 1916, Dearborn & Co. sent a letter to W. R. Grace & Co. reading as follows:

"January 4, 1916.

Messrs. W. R. Grace & Co.,
New York City.
Attention Mr. Fischer:

Dear Sirs:

Yours of the 3d received.

'TAMPICO': We confirm your statement that this steamer is substituted for the 'EUREKA' and

if the Canal is closed (14) when she is ready to sail from nitrate port she is to proceed to San Francisco with $1 per ton less freight than via the Canal, say $8 per ton.

Very truly yours."

Attached to this letter was a copy of the charter-party of the "EUREKA" and they were sent in the attempt to meet the obligation created by that charter-party.

There is no evidence that D. B. Dearborn & Co. had any knowledge or were advised of the correspondence between Sudden & Christenson and Crossett Western Lumber Compnay, above narrated.

The letter of January 4, 1916, was written in an attempt to use the "TAMPICO" in place of the "EUREKA" to fulfill the obligation of a subsisting charter-party and Sudden & Christenson entered into no new engagement with W. R. Grace & Co.

Under this situation, and while the Panama Canal was still closed and no one had any idea as to when it could be reopened, and with the definite knowledge that under no circumstances would the "TAMPICO" be permitted to go to the Atlantic Coast, Sudden & Christenson began a second voyage February 22, 1916, sending the steamer to South America to load a cargo of nitrate for W. R. Grace & Co.

A reading of the evidence leads irresistibly to the conclusion that Sudden & Christenson expected the

vessel to return to San Francisco and deliver the cargo there, and that the claims set up in this cause were a pure afterthought.

The vessel took her cargo of nitrate and returned to San Francisco and unloaded her cargo there. But accidents happened during the voyage and these accidents undoubtedly suggested to Sudden & Christenson the claims now asserted.

The steamer struck a rock and was delayed several days for repairs. This delay was sufficient so that when the "TAMPICO" arrived off the Pacific entrance to the Panama Canal the Canal was opened for navigation and it would have been possible to have gone through the Canal; but the Captain of the vessel, acting on instructions from the Pacific Coast Steamship Company prior to loading, proceeded to San Francisco where the cargo was unloaded and delivered to W. R. Grace & Co., and the vessel redelivered to Crossett Western Lumber Company May 19, 1916.

On the prior appeal this court held that when Sudden & Christenson applied to the Crossett Western Lumber Company for information as to the date of termination of the charter, and Crossett Western Lumber Company replied giving the date but failing to state that the owners had the right to anticipate that date on giving notice, *if* Sudden & Christenson *relying thereon,* proceeded to sub-charter the vessel to W. R. Grace & Co., that Crossett Western Lumber Company was thereby estopped from thereafter claiming a return of the vessel at the earlier date, and that thereafter the earlier termi-

nation of the voyage by the action of the Captain in taking the steamer to San Francisco, rather than going through the Canal to New York, was an actionable wrong against Sudden & Christenson for which they were entitled to damages, and the cause was referred back to the District Court to ascertain what was the contractual relationship between Sudden & Christenson and Crossett Western Lumber Company, and what, if any, damages Sudden & Christenson had suffered.

In the District Court judgment was again given against Sudden & Christenson and in favor of Crossett Western Lumber Company for the unpaid charter hire for the steamship "TAMPICO" up to the date and hour of redelivery, but judgment for damages in favor of Sudden & Christenson against Crossett Western Lumber Company in a larger amount than the charter hire unpaid, was given, with a net judgment in favor of Sudden & Christenson against Crossett Western Lumber Company, from which this appeal is now taken.

This appeal presents several questions, within the rulings of this court on the prior appeal:

First: The record contains no evidence showing that Sudden & Christenson entered into a *new* contract with W. R. Grace & Co. *relying on* any statement or representation by the Crossett Western Lumber Company.

Second: This court on the prior appeal held that there was no evidence before it on which it could award damages against the Crossett Western Lumber Com-

pany, and remanded the case in order that that evidence might be supplied. The only evidence taken on such remand is a repetition of evidence already to be found in the record, and no new or additional evidence was presented. It is our contention that the District Court erred in awarding Sudden & Christenson damages upon evidence which the Circuit Court of Appeals had in effect declared to be insufficient.

Third: No evidence has been offered showing Sudden & Christenson as entitled to damages within any recognized rule governing the awarding of damages for breach of contract.

Fourth: It affirmatively appears from the evidence offered on behalf of Sudden & Christenson that Sudden & Christenson are claiming damages arising out of a voyage undertaken in violation of the charter-party from Crossett Western Lumber Company to Sudden & Christenson, which forbade a sub-charter without consent, and no consent was given.

Fifth: That if there was a breach by Crossett Western Lumber Company, it occurred January 10, 1916, and the attempted voyage to New York, alleged to have been entered upon, was wrongful, because of the rule against enhancing damages where there has been an "anticipatory breach".

Sixth: Finally, assuming the existence of a contractual relation and a breach, all the evidence of the record does not justify a finding of anything more than nominal damages in favor of Sudden & Christenson.

ARGUMENT

Doctrine of estoppel as laid down in the opinion of the Circuit Court of Appeals not applicable to the facts as now developed.

In the course of its opinion this court used this language with reference to the claim that the Crossett Western Lumber Company was estopped by its letter and its failure to advise Sudden & Christenson of the anticipation clause in the original charter from setting up the literal terms of the contract as a defense to Sudden & Christenson's claim for damages:

> "The appellant's (Sudden & Christenson) defense to the original libel and its claim for damages in the cross-libel, rest upon estoppel, and to establish estoppel it must show that *relying upon the representations of the appellee,* it changed its position to its injury." (The italics are ours.)

Under the rule thus laid down, it was incumbent upon Sudden & Christenson not merely to prove that the Crossett Western Lumber Company wrote the letter and that it subsequently entered into a contract, but also that it entered into such contract *relying upon the representations* made. It is not enough that *somebody* knew of the representations. It is also requisite that the action taken was in reliance upon such representations. If, therefore, the action taken was taken without knowledge of those representations on the part of the *active agent* in the negotigations, then the condition established by the court has not been met.

This court sent the case back to the District Court to ascertain just what were the contractual relations between the parties and what damages had been suffered, if any.

Pursuant thereto, there was taken the testimony of but one witness, Arthur B. Cahill, for Sudden & Christenson, and little that was new was developed therefrom. This witness had testified on the former trial, and he merely repeated what he had previously testified, and had very little personal knowledge from which to testify, and he added nothing to the evidence which this court had found insufficient as a basis for assessing any damages in favor of Sudden & Christenson.

Cahill's testimony discloses that the negotiations, pursuant to which the vessel was chartered to W. R. Grace & Co., were conducted by D. B. Dearborn & Co. of New York.

"Q. Who are D. B. Dearborn & Co. of New York?

A. D. B. Dearborn & Co. of New York were our New York agents.

Q. In the course of their duties as your agents, did they customarily contract for vessels in their own name?

A. Yes, sir.

Q. And for your account?

A. Yes, sir.

Q. Between whom were the negotiations that you have testified to between Sudden & Christenson and W. R. Grace & Co. for the "TAMPICO" conducted?

A. They were conducted by D. B. Dearborn.

Q. With what office of W. R. Grace & Co.?

A. The New York office of W. R. Grace & Co."

(Second Apostles, pp. 15 and 16.)

And on page 21 Cahill admitted that he had no personal knowledge.

The testimony of Dearborn was not offered.

No attempt was made to show that the letter from Crossett Western Lumber Company to Sudden & Christenson was communicated to D. B. Dearborn & Co. or that D. B. Dearborn & Co. was not aware of the exact provisions of the charter which permitted a demand for an earlier return of the vessel.

Under the circumstances it very probably was the fact that D. B. Dearborn & Co. had in their possession the charter-party, the terms of which Sudden & Christenson wrote to Crossett Western Lumber Company to inquire.

D. B. Dearborn & Co. were New York agents of Sudden & Christenson for the purpose of "chartering for our account, for the handling of our vessels on the Atlantic Coast."

In order for Sudden & Christenson to recover damages upon the basis of the rules of estoppel laid down in this case, it was not enough to prove that Crossett Western Lumber Company wrongfully advised Sudden & Christenson that the "TAMPICO" did not have to be returned until June 15.

It would be necessary to go further and prove that this information was imparted to D. B. Dearborn & Co., the general agents conducting the negotiations with W. R. Grace & Co., and that D. B. Dearborn & Co. acted in reliance thereon, and in ignorance of the terms of the charter-party itself.

But, it is pertinent to inquire just what was the charter-party which D. B. Dearborn & Co., as agents for Sudden & Christenson, are assumed to have made with W. R. Grace & Co., and see if there was actually any *new* engagement *then* entered into.

It appears that long prior, in September, 1915, Sudden & Christenson chartered to W. R. Grace & Co. the steamer "EUREKA," to carry a cargo of nitrates from the West Coast of South America to New York, and were bound thereby, and were seeking to fulfil that obligation with some other vessel because the closing of the Panama Canal prevented the "EUREKA" from going to South America. (Second Apostles p. 12.)

> "A. Sudden & Christenson entered into a contract to move a cargo of nitrate from the West Coast of South America to the East Coast of the United States.

Q. On what vessel was that, Mr. Cahill?

A. On the steamer 'EUREKA.'

Q. And what happened with reference to that engagement between Sudden & Christenson and W. R. Grace & Co.?

A. Sudden & Christenson were obligated to move this cargo by the steamer 'EUREKA' and wanted to substitute the steamer 'TAMPICO.' "

(Second Apostles, p. 12.)

And because of that obligation then subsisting and binding, D. B. Dearborn & Co., as agents for Sudden & Christenson, wrote the letter of January 4, 1916, to W. R. Grace & Co.:

"January 4, 1916.

Messrs. W. R. Grace & Co.,
New York City.
Attention, Mr. Fischer:

Dear Sirs:

Yours of the 3d received.

'TAMPICO': We confirm your statement that this steamer is substituted for the 'EUREKA' and if the Canal is closed (14) when she is ready to sail from nitrate port she is to proceed to San Francisco with $1 per ton less freight than via the Canal, say $8 per ton.

Very truly yours."

(Second Apostles, p. 16.)

From this, it is evident that no *new* obligation was entered into by Sudden &Christenson relying on the letter of Crossett Western Lumber Company. Sudden & Christenson were already bound to W. R. Grace & Co. and liable in damages if they failed to move the cargo of nitrates. That liability arose from the contract entered into the preceding September, and not from the letter of January 4, 1916, just quoted.

The letter of January 4, 1916, created no new obligation and no new engagement was entered into then or at any time, relying on the letter of Crossett Western Lumber Company giving the date of expiration of the charter of the "TAMPICO" or otherwise.

The letter of January 4, 1916, was written in an attempt to use the "TAMPICO" in place of the "EUREKA" to meet the obligation of the charter-party of the previous September, and Sudden & Christenson made thereby no new contract with W. R. Grace & Co. and assumed no new liability.

This evidence was all before the court and the items of damage now claimed were presented to this court on the former hearing and not allowed. The court sent the same back to the District Court to permit the taking of further evidence.

In its opinion there was something lacking. We submit that that lack has not been supplied by Mr. Cahill's repetition of his former testimony, which was all the evidence offered on the second trial.

Conceding that the letter of Crossett Western Lumber Company to Sudden & Christenson would serve as the basis of an estoppel, it does not appear that any *new contractual relations were entered into relying thereon.*

In view of this condition of the record, and in view of the fact that this court on the former appeal did not allow the claim of Sudden & Christenson, we respectfully submit that no additional reasons have been shown why the claim should be allowed.

In the absence of additional evidence this court should not now allow what it did not then allow.

> "It is not the habit of this court to consider points again open for discussion which have been once deliberately decided, and which have furnished the groundwork of the judgment already rendered in the same cause in a former stage of its proceedings."
>
> United States vs. 422 Casks of Wine, 1 Pet. 547; 7 L. Ed. 257.

> "Seventh syllabus. Where an appellate court decides that certain evidence is insufficient to establish a fact in controversy, it will regard the question as *res judicata* on a subsequent appeal from a new trial upon substantially the same evidence, notwithstanding the introduction on the new trial of additional but merely cumulative evidence of the same character."
>
> Westfall vs. Wait, 165 Ind. 353; 73 N. E. 1089; 6 Ann. Cas. 788.

To the report of this case in 6 Annotated Cases is appended an exhaustive note collating other numerous authorities holding uniformly in accord with the syllabus quoted.

See also Standard Sewing Machine Co. vs. Leslie, 118 Fed. 557; King vs. La Grange, 61 Cal. 231.

But let us now, for the purposes of this argument, assume certain things which, nevertheless, we contend are not proven.

Assume that by reason of the letter, Crossett Western Lumber Company was estopped to claim a return of the vessel prior to June 15 because Sudden & Christenson had entered into an agreement binding on it, relying on that letter as a correct statement of the limits of their rights.

The question then arises as to whether that agreement was one which they had a right to make under the terms of their charter from Crossett Western Lumber Company.

If it was not, then, of course, they can base no claim for damages on the assertion that they were prevented from fulfilling such agreement.

They cannot collect damages from Crossett Western Lumber Company because of their failure to comply with a charter to W. R. Grace & Co. which they made in violation of their contract with Crossett Western Lumber Company.

The charter of the "TAMPICO" from Crossett Western Lumber Company to Sudden & Christenson, clause 27, (First Apostles, p. 14), forbade a sub-charter by Sudden & Christenson without the consent of Crossett Western Lumber Company.

> "27. Charterers to have the option of subletting the steamer, provided consent of owners is obtained."

It cannot be disputed that no consent was ever given, nor does it appear that it was even asked for.

Sudden & Christenson ignored this provision of their charter in dealing with W. R. Grace & Co., and attempted to substitute the "TAMPICO" for the "EUREKA" under the existing charter of the "EUREKA."

> "A. We never consented to any sub-charter."
>
> (Testimony of Mitchell, then manager of Crossett Western Lumber Company, First Apostles, p. 53.)

While there has been an attempt to assume that the agreement between Sudden & Christenson and W. R. Grace & Co. was not a charter, yet such assumption is clearly an afterthought, as appears both from an inspection of the writing and from the testimony of Sudden & Christenson's witnesses with reference thereto.

The charter from Sudden & Christenson to W. R. Grace is in evidence as "Christenson's Exhibit 1." (Second Apostles, p. 10; First Apostles, p. 114.)

Throughout this instrument W. R. Grace & Co. are referred to as "Charterers," and it is stipulated that the vessel shall proceed as charterers "direct, to port or ports within the range of above options" and that the "Master shall receive orders from W. R. Grace & Co., New York."

That Sudden & Christenson held that they had "sub-chartered" to W. R. Grace & Co. is evidenced by their stipulations and by the testimony of their witnesses. At the bottom of page 10 of Second Apostles is a stipulation in which the agreement is referred to as a "Charter-party." In paragraph VI of the stipulation of facts, page 143 of First Apostles, it clearly appears that the "TAMPICO" was sub-chartered to W. R. Grace & Co.

In Cahill's testimony he refers to it as a "charter-party" and says that D. B. Dearborn & Co., who negotiated the contract on behalf of Sudden & Christenson, were agents of Sudden & Christenson, "For chartering for our account, for the handling of our vessels on the Atlantic Coast," and counsel for Sudden & Christenson in examining Mr. Cahill referred to the "charter-party."

Clearly, if it was a "charter-party," entered into without obtaining from Crossett Western Lumber Company the consent which the charter from Crossett Western Lumber Company to Sudden & Christenson required, then Sudden & Christenson can not pass along to, and collect from, Crossett Western Lumber Company the claim of W. R. Grace & Co. against Sudden & Christenson, because for any reason Sudden & Christ-

enson failed to complete their undertaking with W. R. Grace & Co.

Based on the assumption that Crossett Western Lumber Company were estopped to demand a return of the vessel prior to June 15, Sudden & Christenson could use the vessel until that date in any way permitted by their charter, and collect damages for any invasion or restraint on their right so to use. But it does not follow that they can collect damages for which they may have become liable for an attempted use of the vessel not permitted by their charter-party.

Of course the actual liability of Sudden & Christenson to W. R. Grace & Co. was based on the charter of the "EUREKA" in September, 1915, and was fixed then, and the attempt to substitute the "TAMPICO" neither created nor affected that liability.

Application of the Doctrine of "Anticipatory Breach"

But for the purposes of this argument only, let us make a further assumption and see that still Sudden & Christenson would not be entitled to the damages claimed.

Let us for the moment assume that Sudden & Christenson had a right to make charter-party to W. R. Grace & Co. for the voyage and for a return to New York, and that they were prevented from complying with their obligation to W. R. Grace & Co., and that Crossett Western Lumber Company breached its contract with Sudden & Christenson.

The question then arises as to when and how Crossett Western Lumber Company breached its obligation, and the answer is obvious that the breach, if any, occurred before the "TAMPICO" began the voyage to South America, and Sudden & Christenson started the vessel, knowing absolutely that she would not be permitted to sail to the port of New York, regardless of whether or not the canal should be reopened.

The vessel started on this voyage February 22, 1916. (second Apostles, p. 19.) On January 10, 1916, nearly a month and a half before the voyage began, the Crossett Western Lumber Company notified Sudden & Christenson by wire that

> "Under no circumstances can we allow 'TAMPICO" to go to Atlantic Coast."

This determination was repeated in the ensuing correspondence.

Following the assumption above noted as to the existence of a contract relation, this wire was a clear and unequivocal "anticipatory breach." The breach, if there was one, occurred then.

The law is well settled as to the liabilities and the rights of the parties where there has been an anticipatory breach. Thereafter, Sudden & Christenson had no right to pursue any course of action which would enhance the damages necessarily resulting from the breach evidenced by that telegram and the firm declaration that under no circumstances would the "TAMPICO" be permitted to go to the Atlantic Coast.

When the Crossett Western Lumber Company sent that telegram it became then, if at all, immediately liable for the direct and ordinary damages resulting therefrom.

What such damages would be is well established by long settled rules of law as the market value of the nitrates in New York, less the cost in South America, and less the freight cost of transportation from South America to New York.

After the breach resulting from the telegram of January 10, 1916, no one had any right to pursue any course of action which would enhance those damages or result in an attempt to inject into the situation any other basis for the computation of damages.

Notwithstanding, Sudden & Christenson, forty-three days afterwards, sent the vessel to South America, and permitted the vessel to be loaded with nitrates, knowing full well that the cargo could not be delivered in New York and that the vessel was bound to return to a port on the Pacific Coast of the United States.

Whatever may be its bearing on the rights of the parties, the conclusion is inevitable that Sudden & Christenson never expected the vessel to go to New York, and it was only the accidental delay to the vessel owing to her striking a rock, that altered the undoubted expectation that she could not pass through a closed canal and had no alternative than to return to San Francisco.

The claim of an expectation and a right to go to New York was clearly an afterthought, based on the accident to the ship.

It is inconceivable that Sudden & Christenson would have deliberately loaded cargo for New York, knowing that the vessel would not be permitted to sail to that port. Beyond a reasonable doubt, the vessel was loaded for San Francisco, and the claim for damages based on a delivery at that port was an afterthought.

But be that as it may, the measure of damages was fixed by the telegram of January 10, 1916, at the market value of the nitrates in New York, less the cost and the freight.

There is no evidence in the record as to the value of nitrates in New York or in South America. There is no proper basis on which can be computed the damages suffered as a result of the refusal of Crossett Western Lumber Company to permit the vessel to go to the Atlantic Coast, and the most the court could do is to award nominal damages for the technical breach founded on the declaration of January 10, 1916, for where there has been, as here, an "anticipatory breach," the injured party cannot nevertheless proceed, and, taking advantage of an unexpected and accidental combination of circumstances, create another and different and more burdensome basis for the computation of damages.

The rights and liabilities of the parties were fixed January 10, 1916.

No Competent Evidence on the Question of Damages

But to pursue the argument in this case another step with another assumption:

Assume for the moment that it were permissible to seek to compute damages on the basis of a right to delivery in New York, yet we maintain that no evidence has been offered to sustain the damages allowed by the District Court.

We will first discuss the question of the amount of the damages awarded Sudden & Christenson, and thereafter will consider whether Sudden & Christenson were entitled to any damages at all.

The claim presented by Messrs. Sudden & Christenson was summed up in a statement presented in the course of his testimony by one of their witnesses, and virtually speaking, the statement is expected to prove itself, because as to the principal item thereof, no evidence is offered to show the correctness thereof. The claim presented by Messrs. Sudden & Christenson is as follows (First Apostles, page 128):

Excess time coming to San Francisco, as above, 4-1/6 days at $325.00	$ 1,354.25
Fuel, 100 hours at 3.737 barrels per hour, at $2	747.40
Time lost in San Pedro fueling, 13 hours 52 minutes, at $325.00	188.24
Commission, 2½% on charter hire, $67,540.39 at 2½%	1,688.50

Deducted by charterers from freight money account delivery of cargo at San Francisco instead of New York, 2787 tons nitrate at $4.70 per ton....		13,098.90
Total		$17,077.29
Less Panama Canal tolls, 1654 net tons at $125....$2,067.50		
Usual time occupied in transit through canal 8 hours, at $13.54	108.32	
Usual fuel consumed in transit through canal, 4 hours at 3.737, 14.948 barrels at $2	29.90	2,205.72
Leaving a balance due of.....		$14,871.57

The principal item in this claim is as follows:

Deducted by charterers from freight money account delivery of cargo at San Francisco instead of New York, 2787 tons nitrate at $4.70 per ton....	$13,098.90

In this statement the word "charterers" means W. R. Grace & Co., and the item means that W. R. Grace & Co. deducted from the amount due from them to Sudden & Christenson for the transportation of the cargo of nitrate $13,098.90.

We think no other conclusion can be deduced from the record than that Sudden & Christenson accepted this claim of W. R. Grace & Co. without question or comment, and it is offered as an item of damage against Crossett Western Lumber Company without evidence

or proof of the right of W. R. Grace & Co. to deduct that specific amount, or any amount. It is purely an arbitrary figure, unexplained and unsupported.

> "Mr. Montgomery. Q. If I understand you correctly, then, the sum of $13,098.90 which you read into the record from a memorandum which you held in your hand, and which you are now seeking to charge against Crossett Western Lumber Company, was made up entirely of that item contained in the statement furnished you by W. R. Grace & Co., without specific knowledge on your own part as to the accuracy of any of the items contained in that statement. Isn't that correct?
>
> A. Yes, sir."

(First Apostles, page 133.)

We submit that the fact, *if it is a fact,* that Sudden & Christenson submitted to an arbitrary deduction on the part of W. R. Grace & Co., does not entitle Sudden & Christenson to set up such deduction as an item of damages against the Crossett Western Lumber Company. There must be evidence that the item was rightfully deducted.

By the question just quoted, counsel for the Crossett Western Lumber Company challenged the character of the testimony, and thereafter (First Apostles, page 134) made a motion "to strike out the testimony of the witness with reference to the items of damage to which he has testified, and particularly as to the item of $13,-

098.90, on the ground that it appears from the witness' testimony that he has no personal knowledge of the accuracy of the amount or the item which went to make up that amount."

The response of counsel for Sudden & Christenson to this motion was to offer in evidence, over objection, "Cahill's exhibit 3," which was apparently an itemized statement of the account between Sudden & Christenson and W. R. Grace & Co. without proof of the correctness of any of the items therein contained. Incidentally, "Cahill's exhibit 3" shows that W. R. Grace & Co. attempted to charge as the half cost of transhipment $3.70 per ton instead of the $4.70 shown in Cahill's testimony (First Apostles, page 128). It was also apparently the amount which the District Court used as the basis for its computation.

Assuming, now, for the purposes of argument that there was a breach by the Crossett Western Lumber Company of its charter-party to Sudden & Christenson, and a resulting breach on the part of Sudden & Christenson of its sub-charter to W. R. Grace & Co., and assuming that W. R. Grace & Co. were entitled to damages against Sudden & Christenson, and Sudden & Christenson, in turn, to pass on its damages to the Crossett Western Lumber Company, let us apply to this situation the general rules governing the awarding of damages and see if there is any evidence justifying the awarding of damages under any of such rules.

Parenthetically, we call attention to the fact that Sudden & Christenson and W. R. Grace & Co. have

themselves and by their own contract, fixed the measure of damages applicable. They agreed that it was worth to W. R. Grace & Co. $9.00 per ton to have this freight delivered to New York and only $8.00 to have it delivered in San Francisco. If Sudden & Christenson had been able to take this freight to New York, they would have been entitled to receive $9.00 instead of the $8.00 for delivering it to San Francisco. If Crossett Western Lumber Company prevented them from getting the $9.00, and if, as a result of the Crossett Western Lumber Company's fault, they only received $8.00, the charter fixes the maximum extent of Crossett Western Lumber Company's liability at $1.00 per ton.

But, if we are to decline to consider the contract between Sudden & Christenson and W. R. Grace & Co. as fixing the measure of damages, then there is no basis for recovery of damages in this case for these reasons:

This whole claim for damages is based upon the assumption that W. R. Grace & Co. wanted the nitrates in New York City. Had the nitrates been lost in transit, the maximum measure of damages to which W. R. Grace & Co. would have been entitled for goods lost in transit would be their value at point of destination, New York.

There is no evidence in this case as to the market value of nitrates in New York, nor is there any evidence of the market value of nitrates in San Francisco where the nitrate was delivered and accepted. So far as this record goes, nitrates may have been more valuable in San Francisco than in New York, and in that

event W. R. Grace & Co. would not have been damaged by being compelled to accept delivery in San Francisco rather than in New York.

There is no evidence in this record that the nitrates ever went to New York, and there is in the record a statement that they were delivered to "some interior point" and not to New York. Unquestionably, if W. R. Grace & Co. had seen fit to have the nitrates transported from San Francisco to New York, they would have been entitled to recover as damages from Sudden & Christenson, the cost of transhipping from San Francisco to New York. However, the nitrates were never sent to New York, and therefore, W. R. Grace & Co. are not entitled to recover a damage which they never suffered.

Had they disposed of the nitrates in San Francisco at the market price prevailing in San Francisco, and that price had been lower than the market price prevailing in New York, they would undoubtedly have been entitled to recover the difference between the New York price and San Francisco price, less the additional $1.00 they would have had to pay for delivering the goods to New York. But there is no evidence that the goods were disposed of either in San Francisco or New York, so that this basis of computing damages is not available.

The extent of the evidence is found in the testimony of Cahill. (First Apostles, pages 133 and 134.) After the witness Cahill had admitted, in response to a question by counsel for the Crossett Western Lumber Company, that he had no knowledge of the accuracy of any of the

items contained in the statement of damages claimed, he was asked by Sudden & Christenson's counsel:

"Q. Mr. Cahill, do you know what the freight rate was from San Francisco to New York on nitrate at the time this nitrate was discharged from the "TAMPICO?"

A. I don't remember the exact freight rate. I know that it was in the neighborhood of $7.00 or $8.00, and at the time of receiving this statement I—

Q. (Interrupting.) Mr. Christenson has just called my attention to the fact that the transhipment was made to some interior point instead of New York. In speaking of the rate being from $7.00 to $8.00, were you speaking of the rate to New York or to some inland point?

A. I don't remember just where the nitrate went, but I know that on receipt of this statement we verified the rate of freight charged to the point of destination."

It would appear from this testimony that the nitrates were shipped "to some inland point." What this inland point was is not shown, and yet it is very material. Suppose, for instance, that the inland point to which the nitrates were transhipped was midway between New York and San Francisco, at a point where the freight rate from San Francisco east was the same as the freight rate from New York west. If such a point was the point of transhipment, then W. R. Grace & Co. suffered no

damage whatever, because it would have cost them as much to have transhipped from New York as from San Francisco. We submit that damages cannot be based upon an inference from an inference.

That the point of transhipment was midway between New York and San Francisco is a fair inference from the testimony just quoted and Cahill's exhibit 3, wherein appears the item charged to Sudden & Christenson by W. R. Grace & Co. reading as follows:

"Half cost of transhipment at $3.70, $10,311.90."

Mr. Cahill, in the testimony just quoted, testified that the freight rate from San Francisco to New York was in the neighborhood of $7.00 or $8.00, and $3.70 is as near as it is possible to come to half of the sum not more definitely fixed than as "in the neighborhood of $7.00 or $8.00."

We respectfully submit that giving the criticised testimony every possible benefit, it is insufficient to justify the charge by W. R. Grace & Co. against Sudden & Christenson, or by Sudden & Christenson against the Crossett Western Lumber Company. To justify charging as an item of damages either the half or the whole of the cost of transhipment from San Francisco "to some inland point," it would be necessary to prove:

First, the point to which shipment was made;

Second, the cost of shipment from San Francisco to that point;

Third, the cost of shipment from New York to that point; and the excess only of the cost of shipment from San Francisco over the cost of shipment from New York would be a proper element of damages.

It is true that W. R. Grace & Co. might, if they had seen fit and could have done so without violating the rule making it obligatory to keep the damages as low as possible, have transported the nitrates to New York and from New York "to some inland point," and then charged Sudden & Christenson with the entire rate to New York, but it is evident from the record that this is not what was done, and it follows that W. R. Grace & Co. were entitled to recoup, not the damages which they might have suffered had they taken the nitrates to New York, but the damages which they did suffer.

But if the comment is made that the transhipment to an interior point where the freight rate was less was for the purpose of keeping down the loss involved in paying the full freight rate to New York, the reply is obvious that it would then become necessary to show the difference between the market price in New York and the point of shipment.

The court will take judicial knowledge of the fact that New York City is a point of arrival and distribution for commerce, and that the market price of any goods distributed from New York, in the absence of evidence to the contrary and special circumstances, must necessarily be the market price in New York plus at least the charge of transportation from New York to that

point. Obviously, otherwise, except under special circumstances, no goods would ever leave New York.

In the foregoing discussion we have endeavored to make plain our contention that from every point of view from which the relations of the parties may be considered, there was a lack of competent evidence to justify an award of damages against Crossett Western Lumber Company for the alleged breach of its contract with Sudden & Christenson.

This court on the former appeal could not find such evidence and sent the case back to the District Court to permit that lack to be supplied. But the most careful search of the evidence offered under this permission demonstrates that the evidence was not supplied, and that the only witness called merely repeated what he had testified on the former trial.

We submit at this point a group of quotations from text books of established reputation, on which we have relied in this argument, although we have taken our stand on principles of law so well established as to need no authorities to support them.

III Sutherland on Damages (3d Ed.), page 2681.

"* * * the measure of damages is the market value of the goods at the place to which they should have been carried, less the value at the place where the carrier agreed to receive them, and less freight."

III Sutherland on Damages (3d Ed.), page 2677.

"If the subject to be transported be merchandise * * *; if no other conveyance is available, that is, if none can be had at all, or if any which is attainable would be so expensive as to leave no margin of profit, then the owner suffers injury to the extent of the difference between the value of the property where it is and the value it would have at the place of destination, less the expenses of shipment under the contract to that place."

III Hutchinson Carriers (3d Ed.), page 1620.

"If, by reason of a delay, there is no market value for the goods at the place of destination, and in consequence they are shipped to another market, the measure of damages will be the difference in value on the market at destination in the condition and at the time they should have arrived and the sum they were sold for on the other market."

III Hutchinson Carriers (3d Ed.), page 1632.

"The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses and diminish the responsibility of the party in default to him."

"When the carrier enters into a contract to transport the goods, and afterwards refuses to accept or to convey them, it has been held that the true measure

of damages to which the owner of the goods is entitled is the difference between the market value at the destination to which they were to have been carried, at the time when they would have arrived there if the carrier had performed his contract, and their value at the same time at the place from which they were to have been carried, less the freight."

III Hutchinson Carriers (3d Ed.), page 1634, note 52.

"When a carrier receives goods for transportation, and fails to deliver them, the owner is entitled to recover the market value of the goods at the time and place to which they should have been delivered. And where the carrier negligently delays the delivery of goods, he is liable for loss in their market value during the delay."

Spring vs. Haskell, 4 Allen (Mass.) 112.

Cutting vs. Grand Trunk Railway, 13 Allen (Mass.) 381.

Ward's Line vs. Elkins, 34 Mich. 439 (quoted in III Hutchinson Carriers (3d Ed.), page 1637.)

"The damages to which Elkins was entitled, if any, would be such as should have placed him in the position he would have occupied had the salt been taken to Chicago by vessel as agreed. It was not an article of specific utility for preservation, but an article of merchandise, and only valuable as such.

The only advantage he could have gained by a timely shipment according to the contract would have been the excess of the value of the salt in the Chicago market, at the date when it should have arrived, beyond what it was worth in Bay City and the expenses of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more.

"He would not have been justified in procuring shipment by rail if the railroad prices would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption, always to be found on the market, and only valuable to the owner for their merchantable qualities."

III Williston on Contracts, Sec. 1299, page 2349.

"It need not be contended that in every case the principle of damages in question will deprive the plaintiff of the right to continue performance of the contract after it has been repudiated. There may be cases where so doing will not needlessly enhance damages, and it is a question of fact in every case

whether such enhancement of damage would be caused. But one distinction is to be observed, so far as the question here under consideration is concerned, between cases where repudiation or countermand takes place before manufacture or work under the contract has been begun and those where notice is given after work has been done, or manufacture begun by him. Where nothing has been done it will almost always be the proper course for the seller to refrain from doing anything, and the measure of his damages will be simply the profit he would have derived had the contract been carried out."

III Williston on Contracts, Sec. 1344, page 2400.

"With the qualifications stated in the following sections, the plaintiff can recover for breach of contract compensation for only such consequences of the breach as are both proximate and natural."

III Williston on Contracts, Sec. 1345, page 2400.

"Though any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged. A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract would not justify damages based on the assumption that the profit would have been made."

In conclusion, we submit:

1. That upon the second trial of this cause there was no new evidence which would bring the case within the doctrine of estoppel as laid down in the opinion of the Circuit Court of Appeals.

2. That under the circumstances Sudden & Christenson had no right to enter into the agreement which they did with W. R. Grace & Company.

3. That the damages, if any, were fixed by the telegram of January 10, 1916, and Sudden & Christenson had no right thereafter to augment the damages by loading a cargo for New York.

4. If Sudden & Christenson submitted to an arbitrary deduction on the part of W. R. Grace & Company, that does not entitle Sudden & Christenson to set up such deduction as an item of damages against Crossett Western Lumber Company without evidence or proof that the item was rightfully deducted. There was no evidence in the case which, under the rules of damages, would justify the awarding of damages in favor of Sudden & Christenson and against Crossett Western Lumber Company.

5. All the evidence now before the court was before it on the former appeal, and there found insufficient as the basis of an award of damages to Sudden & Christenson. The permission to take further testimony resulted in no additional facts.

Respectfully submitted,

PLATT & PLATT, MONTGOMERY & FALES,

Proctors for Appellant.